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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY ALLAN HILL,

Defendant and Appellant.

F055740

(Super. Ct. No. VCF161154)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Jeffrey Allan Hill appeals from a judgment after a jury convicted him of first degree felony murder involving the theft of methamphetamine from the victim's

residence. Appellant contends: (1) the trial court prejudicially erred in instructing the jury with CALCRIM No. 376, "Possession of Recently Stolen Property as Evidence of Crime"[1]; and (2) the court should have stayed his sentence for possession of the methamphetamine under Penal Code section 654.[2] We agree with appellant's latter argument. We shall order the judgment modified accordingly and otherwise shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant admitted to police investigators that on the afternoon of March 14, 2006, he broke into the house of the victim, Danny Davidson, with the intention to steal the victim's drugs. Appellant did not mean to hurt the victim. Rather, his original plan was to tie up the victim, rob him of dope, and then leave him with a knife so he could cut his way out. However, after appellant burst into the victim's bedroom, the victim grabbed appellant's shotgun and a protracted struggle over the gun ensued. During their struggle over the gun, appellant ran the victim's head against any hard surface he could find, including a dresser and the wall.

Eventually, the victim grew tired and appellant overpowered him. Appellant tied the victim's hands behind his back with zip-ties he brought with him and some shoelaces he found and then searched the victim's room. Appellant thought the victim, who was lying quietly face down on the floor, was asleep from exhaustion. Appellant found drugs in various locations in the victim's bedroom and stuffed them into a fanny pack he also found in the room. The fanny pack itself contained drugs and money when appellant found it.

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1 Judicial Council of California Criminal Jury Instructions (2007-2008) (CALCRIM).

2 Further statutory references are to the Penal Code unless otherwise specified.

Two of the victim's friends, who encountered appellant as he was leaving the victim's residence, discovered the victim's body and called the police. An autopsy revealed the victim died as a result of blunt force trauma to the head and chest.

On the evening of March 14, 2006, police found appellant hiding in a tunnel near a canal about a half-mile from the victim's house. Later, the police found appellant's shotgun, the fanny pack he took from the victim's residence, and other items he buried near the canal. The fanny pack contained, among other things, a total of 30.61 grams of methamphetamine.

Appellant testified in his own defense that the victim was already dead when he broke into the house and stole the drugs. Appellant claimed he lied to the police because he thought they were going to pin the crime on him no matter what he told them and the best thing he could think to do was hope to get a manslaughter deal.

The defense also presented the testimony of Julia Wright. Wright testified regarding a conversation she had with a person named Jason Drysdale. Drysdale told her that he and a few other people killed the victim and appellant was not there when they killed him but came to the house after the victim was already dead.

Appellant was charged by first amended information with felony murder with the special circumstance that the murder was committed while appellant was engaged in the commission of the crimes of robbery and burglary (§§ 187, subd. (a), 190.2, subd. (a)(17); count 1). He was also charged with first degree residential robbery (§ 211; count 2), first degree burglary with another person present (§ 459, subd. (b); count 3), possession of a firearm by a felon (§ 12021, subd. (a)(1); count 4), and possession of a controlled substance (methamphetamine) (Health & Saf. Code, § 11377, subd. (a)). On counts 1 and 2, it was alleged that appellant personally used a firearm within the meaning of section 12022.53, subdivision (b), and on count 3, that he personally used a firearm within the meaning of section 1203.06, subdivision (a)(1) and section 12022.5, subdivision (a)(1). On counts 1 through 5, it was alleged that appellant had suffered one

prior strike conviction (§§ 667, subds. (b)-(i) and 1170.12, (a)-(d)) and, on counts 1 through 3, that he had suffered one prior serious felony conviction (§ 667, subd. (a)(1)).

A jury found appellant guilty on all five counts and found the special circumstance and firearm enhancements to be true. In a bifurcated proceeding, the trial court found the prior strike and prior serious felony allegations to be true. The court sentenced appellant to life without the possibility of parole on count 1 felony murder. Appellant received an additional determinate term of 20 years four months calculated as follows: 10 years for the personal firearm use enhancement and five years for the serious felony in count 1, four years for count 4 possession of a firearm by a felon, and 16 months for count 5 possession of a controlled substance. Appellant's sentences for counts 2 and 3 robbery and burglary were stayed under section 654.

DISCUSSION

I. CALCRIM No. 376

Appellant contends the trial court erred in instructing the jury with a modified version of CALCRIM No. 376, which was not restricted to the crimes of robbery and burglary but also included references to felony murder.[3] Appellant is correct. (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1176 (*Barker*) [error in felony-murder case to

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[3] Specifically, the trial court instructed the jury with CALCRIM No. 376 as follows: "If you conclude that the defendant knew he possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of *felony murder*, robbery, attempted robbery, theft, or burglary, or *the special circumstance of murder during the commission of a robbery*, based on those facts alone. However, if you also find that supporting evidence tends to prove his guilt, then you may conclude that the evidence is sufficient to prove he committed *felony murder*, robbery, attempted robbery, theft, or burglary, or the special circumstance allegation. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of the crime of *felony murder*, robbery, attempted robbery, theft, or burglary or the special circumstance allegation. [¶] Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." (Italics added.)

modify CALJIC No. 2.15 (CALCRIM No. 376's predecessor) to reference both murder and robbery]; *People v. Prieto* (2003) 30 Cal.4th 226, 248 (*Prieto*) ["We find *Barker* persuasive and hold that the trial court's application of CALJIC No. 2.15 to nontheft offenses like rape or murder was improper"].)[4] "Proof a defendant was in conscious possession of recently stolen property simply does not lead naturally and logically to the conclusion the defendant committed a murder to obtain the property." (*Barker*, *supra*, 91 Cal.App.4th at p. 1176, fn. omitted.)

The question then becomes whether appellant was prejudiced by the error. Based on all the circumstances of this case, we conclude appellant was not. The trial court properly instructed the jury on the required elements of felony murder and the special circumstances. Additionally, the court instructed the jury that the prosecutor had the burden of proving each of the required elements beyond a reasonable doubt. Finally, the court instructed the jury on its responsibility to evaluate all the evidence, including how to properly evaluate circumstantial evidence. Although the court erred in instructing the jury with CALCRIM No. 376, given all the instructions we do not think it reasonably likely the jury misinterpreted the law in a manner unfavorable to appellant. (*Barker*, *supra*, 91 Cal.App.4th at pp. 1176-1177.) Moreover, in light of appellant's detailed statements admitting to police that the victim was still alive when he broke into the victim's house to steal drugs, it is not reasonably probable he would have received a more favorable result had the trial court not instructed the jury with CALCRIM No. 376.[5]

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4 Inexplicably, neither appellant nor respondent cites this established case authority addressing analogous instructional error. However, we agree with respondent that any error was harmless.

5 Appellant suggests the appropriate standard of review is the one articulated in *Chapman v. California* (1967) 386 U.S. 18. In *Prieto, supra*, 30 Cal.4th at pages 248-249, the California Supreme Court concluded the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, applies. Based on *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, we must do the same. (*People v. Harden* (2003) 110 Cal.App.4th 848, 859.)

II. Penal Code Section 654

As indicated above, appellant was convicted in count 5 for possession of controlled substances based on his possession of the methamphetamine he took from the victim's house and was sentenced to a consecutive term of 16 months. Appellant contends the trial court should have stayed his sentence on count 5 under section 654. We agree.

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The section protects against multiple punishment for "multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).)

In order to determine whether a course of conduct is indivisible, the court looks to "defendant's intent and objective, not the temporal proximity of his offenses." (*Harrison, supra*, 48 Cal.3d at p. 335.) Thus, "if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*)

Whether a course of conduct is indivisible for the purpose of section 654 is primarily a factual determination for the trial court. (*Harrison, supra,* 48 Cal.3d at p. 335; *People v. Nelson* (1989) 211 Cal.App.3d 634, 638 (*Nelson*).) The trial court's finding must be upheld on appeal if supported by substantial evidence. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713; *Nelson, supra,* 211 Cal.App.3d at p. 638.)

People v. Quinn (1964) 61 Cal.2d 551 (*Quinn*), on which appellant relies, is instructive.[6] There, the defendant robbed a pharmacy, taking cash and narcotics, and escaping in an automobile stolen the previous night. (*Quinn, supra,* 61 Cal.2d at p. 552.) He was convicted of robbery, automobile theft, and possession of narcotics. (*Ibid.*) His conviction was reversed on other grounds but the court addressed the sentencing issue that might arise on retrial, stating: "[T]he theft and possession of the narcotics, the theft of the money, and the robbery were all part of an indivisible criminal transaction. [Citations.] Accordingly, if on retrial defendant is convicted of both possession of narcotics and robbery, he may be sentenced only for first degree robbery, the more serious of the two offenses. [Citation.]" (*Quinn, supra,* 61 Cal.2d at p. 556.)

Here, appellant undisputedly had one intent and objective and that was to obtain possession of drugs; the robbery of the victim was the means to that end. As in *Quinn,* the robbery and the possession of drugs were all part of an indivisible course of conduct. Like his sentences for robbery and burglary, appellant's sentence on count 5 should have been stayed under section 654.

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6 Respondent does not address *Quinn* but relies instead on a case involving convictions of robbery and being an ex-felon in possession of a firearm to argue that appellant may be separately punished for possession of the methamphetamine he took from the victim during the robbery and burglary of the victim's residence. (See *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413 ["A justifiable inference from this evidence is that defendant's possession of the weapon was not merely simultaneous with the robberies, but continued before, during and after those crimes. Section 654 therefore does not prohibit separate punishments."].) We agree with appellant that *Ratcliff* is inapposite.

DISPOSITION

The judgment is modified to stay appellant's sentence on count 5 for possession of a controlled substance under section 654. The trial court is directed to issue an amended abstract of judgment reflecting the modified judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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HILL, J.

WE CONCUR:

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CORNELL, Acting P.J.

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GOMES, J.